(27)

No. 1039

Office - Supreme Court, U.
FILED
APR 6 1942
CHARLES ELMORE CRO
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

ANNA SHEPANEK, Individually and as Administratrix of the Estate of William Babicz, also known as William La Valley,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

EDWARD H. S. MARTIN,
Attorney for Respondent,
Room 1140 Otis Building,
10 South La Salle Street,
Chicago, Illinois.

INDEX.

	PAGE
Questions presented	2
Statutes involved	2
Statement	3
Argument	3
Conclusion	5

CITATIONS.

Cases:

Bd. of Pub. Inst. v. Meredith, 119 F. (2) 712	4
Cudahy P. Co. v. U. S., 37 F. Supp. 563	4
Fox v. Johnson & W., Inc., 5 F. Rules Serv. 56c 41, Case 6	4
Hemler v. Un. P. Co., 40 F. Supp. 824	4
Miller v. Miller, 122 F. (2) 209	4
U. S. v. Am. N. B. & T. Co., Adm., 124 F. (2) 743	1
U. S. v. Lawson, 124 F. (2) 1020	5

Rule:

Rule 56, Rules of Civ. Proc	2, 3

In The

Supreme Court of the United States

October Term, 1941.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

ANNA SHEPANEK, Individually and as Administratrix of the Estate of William Babicz, also known as William La Valley,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Except as otherwise stated herein, we adopt as ours the brief and argument in opposition filed by respondent in No. 1038, *U. S.* v. *Am. N. B. & T. Co. of Chi., Admr.*, referred to in the petition. Those exceptions follow:

QUESTIONS PRESENTED.

Although the questions stated in the petition are not really presented by the record in this case, yet, if presented, our contentions with respect thereto would be the same as in respondent's brief and argument in No. 1038. They are not presented because the summary judgment was rendered below on the facts and there was no statement under oath and no admission tending in any way to substantiate the allegation of petitioner's answer that the deceased ever became totally and permanently disabled. The real question presented, therefore, is:

Whether, under the Rules of Civil Procedure, the bare, unsworn statement in a pleading, unsupported by any admission or subsequent affidavit, will deprive a plaintiff of a right, otherwise duly established, to a summary judgment.

STATUTES INVOLVED.

In addition to those mentioned in No. 1038, there is Rule 56 of the Rules of Civil Procedure, governing summary judgments, the material parts of which are as follows:

> "(c) * * * The adverse party prior to the date of hearing may serve opposing affidavits. The judgment shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *
>
> (e) Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

STATEMENT.

The statement in the petition is sufficient, except that it should be noted that the Government's answer to the amended petition and its answer to the motion for summary judgment were neither of them verified and there was no affidavit nor admission substantiating the allegations thereof with respect to total permanent disability.

ARGUMENT.

I, II and III.

We adopt the argument under the above numerical headings in respondent's brief and argument in opposition in No. 1038.

IV.

Even if certiorari were allowed in No. 1038, it would still be useless to allow it in the instant case, where the District Court did not strike out any part of the Government's answer, but considered the matter purely on the admissions and the affidavit offered in support of respondent's motion for summary judgment and granted such judgment. The allegations in the Government's answer to the effect that the deceased became totally and permanently disabled, and the time thereof, are so many mere words, unsupported by any affidavit or admission, and are therefore nothing but a sham pleading. Respondent's motion was supported by affidavits and admissions showing a clear right to a summary judgment, and no unverified statement in any Government pleading could take away the right to such judgment, for that is one of the very purposes of Rule 56, Rules of Civil Procedure,

namely, to prevent delay in recovery of judgment by mere sham allegations in pleadings, when there is no evidence whatever tending to support such allegations.

Not that they are of any binding force, but merely to show how the lower courts are construing this rule, we cite the following:

> "The purpose of this rule 'is to dispose of cases when there is no *genuine* issue of fact even though an issue may be raised formally by the pleadings.'"
>
> *Miller* v. *Miller,* 122 F. (2) 209, 212 (App. D. C.).

> "Had the affidavits been retained in the files, the result should not have been different. They did not state facts sufficient to create a 'genuine issue as to any material fact,' within Rule 56c, upon the controlling issue in the case."
>
> *Fox* v. *Johnson & W., Inc.*, ... F. (2) ...., 5 F. Rules Serv. 56c 41, Case 6 (App. D. C.).

> "Nothing remained to be shown except that the coupons were actually clipped from the genuine bonds and the amount for which judgment should be entered. It was entirely in keeping with the letter and spirit of Rule 56 that this could be done by *ex parte* affidavits which were not offset by opposing affidavits."
>
> *Bd. of Pub. Inst.* v. *Meredith,* 119 F. (2) 712 (CCA 5).

To the same effect are:

Cudahy P. Co. v. *U. S.*, 37 F. Supp. 563 (N. D. Ill.).

Hemler v. *Un. P. Co.*, 40 F. Supp. 824 (W. D. La.).

CONCLUSION.

Regardless of whether the case is important or not, the result below seems clearly right and agrees with the decision of the Sixth Circuit in *U. S.* v. *Lawson,* 124 F. (2) 1020. Conflict of decision does not seem likely in the future. Even if petitioner's argument as to the effect of prior total permanent disability is sustained and a reversal follows in the *Lawson* case and in No. 1038, the judgment would still have to be affirmed in the instant case, because of the lack of any verified allegation of such total permanent disability. The petition should be denied.

EDWARD H. S. MARTIN,
Attorney for Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1038

THE UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, ADMINISTRATOR, ETC.

No. 1039

THE UNITED STATES OF AMERICA, PETITIONER

v.

ANNA SHEPANEK, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM BABICZ, ALSO KNOWN AS WILLIAM LA VALLEY

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 1090

THE UNITED STATES OF AMERICA, PETITIONER

v.

PEARLIE LAWSON, ADMINISTRATRIX OF THE ESTATE OF HOBART LAWSON, DECEASED, AND JOHN A. POLIN, ADMINISTRATOR OF THE ESTATE OF HENRY LAWSON, BENEFICIARY, DECEASED

456810—42

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN REPLY TO THE BRIEFS IN OPPOSITION

1. There is, we submit, no merit in the contention of respondents in Nos. 1038 and 1039 (No. 1038, Br. in Opp. 4–5; No. 1039, Br. in Opp. 3) that this Court should not consider the letters of the Administrator of Veterans' Affairs printed in the appendices to the Government's petitions for writs of certiorari in No. 1038 (pp. 13–14) and in the *Florian* case (pp. 22–25) as showing a long continued and consistent administrative practice, in accordance with the interpretation of Section 305, World War Veterans' Act, urged by the Government.

(a) It cannot be doubted that administrative practice is a proper subject of judicial notice. *Orchard* v. *Alexander,* 157 U. S. 372, 383; *United States* v. *Minnesota,* 270 U. S. 181, 205; *Smith* v. *United States,* 56 F. (2d) 636, 638 (D. C. S. D. Ia.); *Bloxham, Comptroller* v. *Consumers Electric Light & Street Railroad Co.,* 36 Fla. 519, 540–541. See also *Caha* v. *United States,* 152 U. S. 211, 221–222; *Helvering* v. *Bliss,* 293 U. S. 144, 151. Such administrative practice, like any other matter within the scope of judicial notice, may be ascertained from any trustworthy source. *The Montello,* 11 Wall. 411, 414–415; *Brown* v. *Piper,* 91 U. S. 37, 42; *Jones* v. *United States,* 137 U. S. 202, 216.

That official letters of the Veterans' Administration constitute a source of this character would seem beyond question. Such letters are disclosed by the opinions of this Court in *United States* v. *Madigan,* 300 U. S. 500, 505, note 6, and in *United States* v. *Towery,* 306 U. S. 324, 332, note 10, as the source of the Court's information with respect to the administrative practice. And that a similar letter was the source of the Court's information in *United States* v. *Patryas,* 303 U. S. 341, is clearly indicated by a comparison of a statement and two quotations in the opinion at p. 346 with the letter to the Solicitor General contained in the Appendix to the Government's brief at pp. 59, 62; 61, and 60, respectively.[1] See also *Byrd* v. *United States,* 106 F. (2d) 821, 824 (C. C. A. 10). This Court has similarly taken judicial notice of official statements based upon the records of other departments of the Government made by the officials in charge of those departments (*Heath* v. *Wallace,* 138 U. S. 573, 584; *Underhill* v. *Hernandez,* 168 U. S. 250, 253), as have other courts (*United States* v. *Brewer-Elliott Oil & Gas Co.,* 249 Fed. 609, 619 (D. C. W. D. Okla.); *Universal Adjustment Corp.* v. *Midland Bank,* 281 Mass. 303, 327).

(b) Administrative practice, like legislative history, is a recognized aid to the court itself in any

[1] In *United States* v. *Worley,* 281 U. S. 339, 343, this Court took judicial notice of the practice of the Veterans' Bureau which was called to its attention merely by a statement in the Government's brief, p. 22.

case involving a question of the construction of a statute of general application. Every such case involves not merely the rights of the parties to the litigation but also the rights of other persons who will be affected by the court's construction of the statute. Hence, as a matter of public policy, as well as for its own assistance, a court is not limited to evidence or information offered by the parties themselves but may ascertain the administrative practice upon its own motion just as it may ascertain the facts with respect to other matters within judicial knowledge. Cf. *The Montello,* 11 Wall. 411, 414–415.

Since administrative practice is an aid to statutory construction and within judicial knowledge, it is, of course, not an exercise of original jurisdiction, in violation of Section 2, Article III, of the Constitution, as respondents argue (No. 1038, Br. in Opp. 4–5; No. 1039, Br. in Opp. 3), for an appellate court to consider administrative practice not considered by the District Court.[2] See *New*

[2] Respondents in Nos. 1038 and 1039 (No. 1038, Br. in Opp. 4; No. 1039, Br. in Opp. 3) infer that the District Court was not apprized in these cases of the administrative practice. With respect to each of these cases this inference is opposed to the recollection of Government counsel who handled the cases in the District Court. Moreover, counsel for respondent in No. 1038 likewise appeared as counsel in the *Florian* case and thus was made fully aware of the administrative practice as recited in that case in the Government's brief in the Circuit Court of Appeals and in the Government's petition for a writ of certiorari (pp. 22–25). The statement relative to the administrative practice was not challenged

York Indians v. *United States,* 170 U. S. 1, 32; *de Bearn* v. *Safe Deposit Co.,* 233 U. S. 24, 32; *Fourth National Bank* v. *Francklyn,* 120 U. S. 747, 751–752; *Rogers* v. *Cady,* 104 Cal. 288, 290. See also *United States* v. *Brewer-Elliott Oil & Gas Co.,* 249 Fed. 609, 619 (D. C. W. D. Okla.), in which the District Court took judicial notice, over objection, of letters which were written to the Attorney General by the Secretary of the Interior after the trial of the case.[3]

(c) Because administrative practice is within judicial knowledge and is a recognized aid to the judiciary in cases involving questions of statutory construction, the Government has consistently called such practice to the attention of the courts in those veterans' cases in which it has been deemed pertinent, whether or not the effect was favorable to the Government's position in the particular case. See the briefs for the Government in *Frederick* v. *United States,* 294 U. S. 695 (Br. 6–16, 21–22); *United States* v. *Patryas,* 303 U. S. 341, 346 (Br. 59, 62; 61, 60); *United States* v. *Jackson,* 302 U. S. 628 (Br. 34–36, 80–85). A brief for the

---

in the *Florian* case either in the Circuit Court of Appeals or in this Court.

[3] The decision of the District Court was affirmed by the Circuit Court of Appeals, *Brewer-Elliott Oil & Gas Co.* v. *United States,* 270 Fed. 100 (C. C. A. 8), and the decision of that court was affirmed by this Court, *Brewer-Elliott Co.* v. *United States,* 260 U. S. 77. Neither this Court nor the Circuit Court of Appeals mentioned the ruling of the District Court with regard to judicial notice.

Veterans' Administration was filed in opposition to the Government's position in *Miller* v. *United States,* 294 U. S. 435, with the consent, of course, of the Solicitor General. See also *Byrd* v. *United States,* 106 F. (2d) 821, 824 (C. C. A. 10); *Boyett* v. *United States,* 86 F. (2d) 66, 67–68 (C. C. A. 5). Furthermore, the Veterans' Administration, so far as we have been able to ascertain, has never refused a request by an attorney for a private litigant for information as to its interpretation and practice.

(d) Respondents argue that no established administrative practice exists or that it has little force because "No specific administrative decisions have been cited" in the letters on which the Government relies (No. 1038, Br. in Opp. 4; No. 1039, Br. in Opp. 3; No. 1090, Br. in Opp. 4).

The contention ignores the relationship of the Veterans' Administration to veterans and their dependents which renders a failure to award benefits fully as significant as a formal denial of claim asserted.

As recognized by this Court in *White* v. *United States,* 270 U. S. 175, 180, the relation of the Government to veterans and their dependents is at least "avuncular" if not "paternal." In this light the Veterans' Administration assumes the duty of initiating action where it is found that benefits authorized by law have not been claimed. The administrative practice in this respect is a corollary of the legislative policy minimizing the participation of attorneys in the presentation

of claims[4] and providing for the recognition of "representatives of the American Red Cross, the American Legion, the Disabled American Veterans, and Veterans of Foreign Wars and * * * other organizations * * * in the presentation or adjudication of claims * * *." (Sec. 500, World War Veterans' Act, as amended, 38 U. S. C. 551.) In view of the elaborate safeguards against any failure to award benefits authorized by statute, the administrative practice is as clearly established by inaction as by denial. Thus the absence of any administrative award of such benefits as those sought in the instant cases discloses a positive and consistent view that Congress did not intend to grant them, while the absence of earlier claim reflects the acquiescence of informed and interested opinion in this view. In the letter of the Administrator of Veterans' Affairs, copied in the *Florian* petition, it is stated (p. 22): "Until the present case the administrative interpretation on this point

---

[4] Section 500, World War Veterans' Act, 1924, as amended, 38 U. S. C. 551, limits to $10 the amount of the fee which may be charged by an attorney or agent for assisting in the preparation and execution of the necessary papers in any application to the Administration.

In the report of the Attorney General's Committee on Administrative Procedure, it is stated (Senate Document No. 8, 77th Cong., 1st Sess., p. 38): "The claimant is assisted in the preparation and development of his claim by representatives of the agency accessible to him in the field. Where specialized or expert knowledge is necessary for the decision of cases, these agencies have developed special administrative units to flrnish the needed aid. * * *"

has never been questioned" although (p. 25) "the number of potential cases which would be affected is extremely large."[5]

2. Respondents in Nos. 1038 and 1039 refer to various factors which they assert, contrary to the Administrator's estimate, will render negligible the number of cases to which the construction of Section 305 by the court below will apply (No. 1038, Br. in Opp. 3–4; No. 1039, Br. in Opp. 3).

Respondents do not challenge the Administrator's statement (Pet. in No. 1038, 13; pet. in the *Florian* case, 24) that the vast majority of more than four million war risk insurance contracts were allowed to lapse when the insureds were discharged from the service.[6] Contrary to respondents' assertion, surrender for cash of a policy to which one of these contracts may have been converted would not necessarily bar a claim for benefits based upon a revival of the original insurance contract under

---

[5] Since administrative practice is a proper subject of judicial notice, it is beside the point that, as stated by the respondent in No. 1090 (Br. in Opp. 4), there has been "no finding of fact or conclusion of law" in regard to such practice. *New York Indians* v. *United States*, 170 U. S. 1, 32. No. 1090 was decided upon a stipulation of facts which included a recitation of the administrative practice.

[6] In *Lynch* v. *United States*, 292 U. S. 571, 576, note 2, annual reports of the Bureau of War Risk Insurance and United States Veterans Bureau were relied upon as authority for the statement that over 75% of the men who carried term insurance while in the service never paid a premium after the war.

Section 305. *United States* v. *Arzner,* 287 U. S. 470.

Respondents' assertion that the "vast" majority of insured persons were not suffering from a compensable disability when their insurance lapsed is scarcely credible in view of the statement of the Administrator, not denied by respondents, that approximately one and three-quarter million claims for compensation have been filed (Pet. in No. 1038, 13; pet. in the *Florian* case, 24). In any event, the nonexistence of a compensable disability at the time of the lapse of the insurance in a vast majority of approximately one and three-quarter million cases would not be inconsistent with the statement of the Administrator to the effect that such disability existed at that time in thousands of cases (Pet. in the *Florian* case, 24), each of which involved insurance amounting on the average to $7,000 (ibid. 25).

There is no ground for respondents' contention that the statute of limitations would reduce the amount to be paid under the construction of Section 305 adopted by the court below. The statute (Section 19 of the World War Veterans' Act, 1924, as amended, 38 U. S. C. 445) applies only to suits in court. There is no time limitation upon filing claims in the Veterans' Administration, and it will be presumed that administrative payment would be made in such cases without the necessity of resorting to suit if that construction of the section should

prevail. Cf. *United States* v. *Towery,* 306 U. S. 324, 331.

Maturity of contracts, listed by respondents as another factor tending to render questionable the Administrator's estimate of the number of cases to which the construction in question would be applicable, has no such effect. The Administrator manifestly took into consideration the number of insurance contracts which had matured by death or total permanent disability while the insureds were in service when he made the statement that the vast majority of the contracts lapsed when the insureds were discharged from the service. It is, therefore, obvious that the percentage of those cases was comparatively small in which either the original or the converted insurance contract matured subsequent to the discharge of the insured.

The restriction in Section 305 upon the class of persons entitled to benefits of insurance revived under that section is also listed by respondents as another factor affecting the Administrator's estimate. But this restriction ordinarily affects merely the determination of the person to whom payment is to be made. It applies only to cases in which total permanent disability or death occurred subsequent to July 2, 1926, the date of the original enactment of the restriction (35 Op. A. G. 241; *Hegg* v. *United States,* 21 F. (2d) 622 (D. C.

Minn.)) and, in any event, was undoubtedly considered by the Administrator.[7]

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
JULIUS C. MARTIN,
Director, Bureau of War Risk Litigation.
WILBUR C. PICKETT,
FENDALL MARBURY,
W. MARVIN SMITH,
Attorneys.

APRIL 1942.

---

[7] Respondent in No. 1039 argues that even if certiorari were allowed in No. 1038, it should not be granted in her case because the District Court was not asked to strike any part of the Government's answer. Indeed, she asserts that the allegations in that answer with respect to total permanent disability of the insured at a time when no compensation was due and uncollected were "unsupported by any affidavit or admission, and are therefore nothing but a sham pleading." Consequently, she insists that she was entitled to summary judgment under Rule 56 of the Federal Rules of Civil Procedure by virtue of her own motion and the supporting affidavit. (Br. in Opp. 3.)

The attack upon the good faith of the Government's answer is unjustified, especially in view of respondent's own allegation of total permanent disability occurring prior to the date alleged by the Government. (R. 3.) Moreover, Rule 11 of the Federal Rules of Civil Procedure expressly provides that "pleadings need not be verified or accompanied by affidavit." Since respondent did not controvert the Government's allegation as to total permanent disability in her motion for summary judgment or supporting affidavit, she must be regarded as having admitted the allegation for the purpose of her motion, thus presenting the same question of law as that involved in No. 1038.

U. S. GOVERNMENT PRINTING OFFICE: 1942